No. 94-1564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Supreme Court, U.S.
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SUSAN SOLOMON PATTULLO, LLOYD RIBNER, as executor of the estate of MURIEL RIBNER, JOSEPH HOLLAND, Commissioner of the Division of Housing and Community Renewal of the State of New York, DENNIS G. VACCO, Attorney General of the State of New York, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Petitioners,

vs.

RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

Amici here are all legal services and other public interest groups that have grave concerns regarding the potentially far-reaching and adverse practical effects of the Second Circuit's decision below. Specifically, under the Second Circuit's

overly broad interpretation of 12 U.S.C. §1821(e) ("Section 1821(e)"), *Amici* fear that *all* rent-regulated tenants nationwide will be placed at risk of future repudiation and eviction. *Amici* are especially concerned for rent-regulated tenants of low and moderate means who are not protected under the Second Circuit's decision.

This brief is submitted on behalf of the Council of New York Cooperatives (CNYC, Inc.), and the Federation of New York Housing Cooperatives ("FNYHC") is joined in its submission by the following organizations: Legal Services for New York City, The Legal Aid Society, Northern Manhattan Improvement Corporation, The Association for Neighborhood and Housing Development, Neighborhood Initiatives Development Corporation, The West Side SRO Law Project, The Community Service Society of New York, Inc., Metropolitan Council on Housing, New York State Tenant & Neighborhood Coalition, Inc., Center for Constitutional Rights, The City-Wide Task Force on Housing Court, Inc., and Community Training and Resource Center, Inc.

CNYC is a voluntary membership organization formed in 1975 to provide information and guidance to cooperative corporation and condominium associations throughout New York. CNYC has more than 1,850 member cooperative corporations and condominium associations. It is in all likelihood the largest organization in New York dealing with the problems of cooperatives and condominiums. FNYHC is a New York not-for-profit corporation representing another 120,000 units of cooperative housing in New York City. CNYC and FNYHC assist their members in the operation and management of their buildings, they hold workshops and seminars, and prepare and disseminate literature. They also meet with legislators and government officials to advise them about issues of concern to cooperatives and condominiums.

The Legal Services for New York City (LSNY) Housing Task Force is composed of attorneys and advocates from

seventeen neighborhood-based legal services offices which provide free legal services to low-income tenants faced with eviction in New York City Housing Court. It is dedicated to the protection of the constitutional and statutory rights of low-income tenants and thus is concerned with the outcome of this case.

The Legal Aid Society is one of the oldest and largest providers of legal assistance to the poor in the United States. The Society is counsel in numerous class-action cases concerning the rights of tenants and homeless families in New York City. Accordingly, the Society has a substantial interest in this case.

Northern Manhattan Improvement Corporation (NMIC) provides free legal services in housing matters to residents of the Washington Heights and Inwood neighborhoods of New York City. Ninety-five percent of NMIC's clients live in rent-regulated housing, and a number of buildings in the communities served by NMIC have been taken over by Resolution Trust Corporation ("RTC"). NMIC is therefore concerned with the impact of RTC takeovers on rent-regulated housing.

The Association for Neighborhood and Housing Development (ANHD) is a membership organization of seventy-five non-for-profit neighborhood-based organizations which preserve and protect housing for low-income people in New York City. ANHD is concerned with the threat to housing affordability posed by the decision in this case.

Neighborhood Initiatives Development Corporation (NIDC) is a non-profit community organization which works with tenants, co-op shareholders, and property owners to improve housing conditions and maintain a stable neighborhood in the area encompassed by Bronx Community Board #11 in New York City. Several years ago, there was a wave of co-op conversions in this community. A number of those co-ops are now in default. One four-building complex consisting of over

300 units has been taken over by RTC. This complex has tremendous financial problems and would be a prime candidate for tenant evictions if RTC were to consider only the financial health of the building and the interest of the government in recouping lost investments. Therefore, RTC's right to evict tenants as a result of the Second Circuit's opinion in this case causes NIDC great concern.

The West Side SRO Law Project was founded by the City of New York in 1981 to preserve both single-room occupancy (SRO) apartments and SRO tenancies, and to advocate for law and policy which would enhance these efforts. The integrity of the rent regulation system is vital to the organization's efforts, and, accordingly, the Law Project has a significant interest in the issues and outcome of this case.

The Community Service Society of New York, Inc., works cooperatively with community-based organizations and other social policy and advocacy groups to fight poverty through research, advocacy, community development, and direct service. Through its activities, the Society has promoted and increased the affordable housing stock for poor and homeless families in New York City and has used legal intervention to protect the rights of poor tenants in the City. The Second Circuit's decision below could damage the overall efforts and goals of the Society. Thus, the organization has a significant interest in the outcome of this case.

Metropolitan Council on Housing is a New York City-wide tenant organization dedicated to decent, affordable, and integrated housing. Because the tenant rights for which Metropolitan Council advocates would clearly be threatened if federal agencies were able to preempt state laws that secure those rights, it has a significant interest in the disposition of this case.

The New York State Tenant and Neighborhood Coalition Inc. (NYSTNC), is a state-wide tenant rights lobbying and

advocacy membership organization. The organization lobbies the New York State legislature on laws affecting tenants' rights and protections, the allocation of funds for the production of affordable housing, and the preservation of existing housing. NYSTNC therefore has a substantial interest in this case.

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the Constitution of the United States and the Universal Declaration of Human Rights. In more than two decades since its founding, CCR has participated, either directly or as *amicus*, in a number of cases involving housing issues. CCR is seriously concerned with the long-range impact of the Second Circuit's decision below, and thus has a significant interest in the disposition of this case.

The City-Wide Task Force on Housing Court, Inc., formed in 1981, is a not-for-profit coalition of community organizations, legal services providers and neighborhood housing advocates committed to improving the administration of justice for unrepresented litigants in New York City's housing court. In addition to providing information and referral services to thousands of unrepresented tenants each year, the Task Force monitors court operations and issues recommendations for court reform. The Task Force is concerned by the decision in this case because, if permitted to stand, such decision is certain to impact the client population served by this organization.

Community Training and Resource Center, Inc. (CTRC), founded as a not-for-profit corporation in 1982, works to improve conditions for lower income tenants and neighborhoods in New York City. Specifically, CTRC organizes neighborhood housing groups into city-wide coalitions that advocate for budgetary and policy reforms that benefit lower income

New York City renters. CTRC is concerned with the ultimate resolution of this case because it will have a profound effect on the constituents served by CTRC.

This brief is submitted in support of the petition for a Writ of Certiorari on behalf of Petitioners. Its purpose is to call to the Court's attention significant additional considerations and grave consequences of the decision of the Court below upon tenants, who are not parties to this action, which were not addressed by the Court below.

ARGUMENT

The question presented by the Petitions in this case is whether RTC's authorization to "disaffirm or repudiate any contract or lease" that it, in its discretion, "determines to be burdensome," pursuant to Section 1821(e) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), includes the power to repudiate statutory tenancies created and continued by virtue of state and local law. In the decision below, the Second Circuit held that repudiation of statutory tenancies was expressly authorized by Section 1821(e). *See RTC v. Diamond*, F.3d (2d Cir. 1995). The Second Circuit reaffirmed their "original conclusion: the rent regulations at issue here merely involve [ ] restrictions imposed on existing tenancies" and determined that "to the extent that the anti-eviction provisions of New York's rent regulations interferes with the operation of §1821(e), the state regulations and laws are preempted by FIRREA." In so holding, the Second Circuit completely ignored a long and unbroken line of authority clearly establishing that, as a matter of New York law, the obligations created by statutory tenancies are *not* contractual in nature and, in fact, cannot even be altered by contract, lease, or agreement.[1]

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[1] *See, e.g., Whitmarsh v. Farnell*, 83 N.E.2d 543 (N.Y. 1949); *Stern v. Equitable Trust Co.*, 144 N.E. 578 (N.Y. 1924); *De Santis v. White Rose Assocs.*, 578 N.Y.S.2d 363 (Sup. Ct. 1992); *Park Summit Realty Corp. v.*

(Footnote continued)

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE CONCERNS A MATTER OF SUBSTANTIAL PUBLIC IMPORTANCE

The Second Circuit's decision holding that the repudiation of statutory tenancies is properly authorized by Section 1821(e) threatens to obliterate not only the continuing viability of New York's rent regulatory scheme, but also the social and public policies upon which that scheme is based.

While this case involves only nine tenancies, under the rationale of the Second Circuit's holding, RTC could ultimately utilize Section 1821(e) to terminate tenancies in *all* rent-regulated units over which it acquires control. While the precise number of rent-regulated units controlled by RTC (or FDIC) is open to question, the number clearly is significant.

Should the decision below survive appeal, *Amici* would have grave concerns regarding when, where, and how RTC will exercise its newly minted and extraordinary power to repudiate statutory tenancies. Conceivably, thousands of low-income and moderate-income tenants across the country could find themselves without a home simply because RTC, in its sole discretion determines that their tenancies "are burdensome."

While the Second Circuit evidenced concern for the potentially far-reaching social implications that its decision might have, in the end it found comfort in an RTC "Policy

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Frank, 434 N.Y.S.2d 73 (App. Term 1980), *aff'd*, 448 N.Y.S.2d 414 (App. Div. 1981), *aff'd*, 439 N.E.2d 358 (1982); *Charlotte Realty Co. v. Lubarsky*, 509 N.Y.S.2d 691 (App. Term 1986).

Statement" purporting to limit the agency's discretion in evicting low-income or moderate-income tenants. RTC's "Policy Statement" is simply an internally generated statement of guidelines that is not found in statute or regulation, it can be modified, revoked, or arguably even ignored at any time, and is not a meaningful constraint on RTC's discretion. As the District Court in this case expressly recognized: "Since section 1821(e)(1) says nothing about income levels, if the section is interpreted to encompass the power to repudiate statutory tenancies, *the RTC would not be required to adopt the income exemptions* that it has in fact adopted in this case." *RTC v. Diamond*, 801 F. Supp. 1152, 1162 n.6 (S.D.N.Y. 1992) (emphasis added), *rev'd in relevant part*, 18 F.3d 111 (2d Cir. 1994).

In other words, although the "Policy Statement" is in effect now and may for a time help mitigate the impact of the Second Circuit's holding on low-income and moderate-income tenants occupying rent-regulated housing, it is neither a guaranteed nor enforceable constraint on RTC's repudiation powers as the Second Circuit has construed them. Accordingly, *Amici* submit that the Second Circuit's advertence to the "Policy Statement" as justifying its holding, is unwarranted.

This Court has long recognized that state and local rent regulatory schemes are not only a legitimate exercise of the states' historic police powers, but also that such ordinances generally serve important public and social policy interests. As the Court observed over 70 years ago:

> The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the state a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that

> it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the state. That such an emergency...would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual basis and justification, for exercise of that power.

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 245 (1922).[2] It is precisely these type of public policy concerns upon which New York's long-standing rent control and rent stabilization systems are based. *See e.g., Morse & Grossman, Inc. v. Acker & Co.*, 79 N.E. 2d 258, 260 (N.Y. 1948) ("[t]he basic purpose of the emergency rent legislation was to protect tenants by placing a ceiling on rents and by preventing widespread evictions while the emergency...shortage of space continued").

There is still an acute shortage of housing in New York City. In 1993, there were approximately 2.06 million rental units in New York City, only 70,000 of which were vacant and available for rent – a vacancy rate of approximately

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[2] *See also Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) ("a primary purpose of rent control is the protection of tenants"); *Bowles v. Willingham*, 321 U.S. 503, 513 n.9 (1944) (one purpose of rent control is "to protect persons with relatively fixed and limited incomes, consumers, wage earners...from undue impairment of their standard of living"); *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (in enacting rent control legislation, Congress "stated the unquestionable embarrassment of Government and danger to the public health in existing condition of things....Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present").

3.4%.[3] Perhaps more importantly, the vacancy rate for low-income housing (asking rents of less than $300) in 1993 was only 0.58%.[4] These vacancy rates are considerably less than the 5% rate that the legislature has deemed to constitute a "housing emergency." New York's rent control and rent stabilization systems are part of a comprehensive legislative effort to deal with this "housing emergency." The decision below threatens seriously to hinder this effort.

In sum, in evaluating the Petitions for Certiorari in this case, *Amici* respectfully request the Court to take into consideration the potentially enormous impact that the Second Circuit's decision might have on local housing markets generally, and on tenants of low and moderate means in particular. The public's interest in safe, affordable, and decent housing – especially in areas where local legislatures have declared housing emergencies – is too important a social policy to leave to the virtually unguided whim of federal agencies charged primarily with "maximizing" the value of government assets.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THIS CASE IS DECIDED CONTRARY TO PRIOR DECISIONS OF THIS COURT

The instant case was commenced in the United States District Court for Southern District of New York. On November 16, 1992, the district court granted New York State's

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[3] *See Selected Findings of the 1993 Housing and Vacancy Survey*, prepared by Assistant Commissioner for Policy Analysis and Research, New York City Department of Housing Preservation and Development (Feb. 8, 1994) (hereinafter *"Selected Findings"*).

[4] *See id.*

motion for summary judgment and denied summary judgment to the RTC. The district court looked to state law for the definition of "contract or lease" and determined that New York's statutory tenancies are not based on leases or contracts. Thereafter, on March 2, 1994 the Second Circuit reversed the district court and held that, because the nine tenancies were grounded in a lease, they fell within FIRREA, notwithstanding the existence of New York's rent regulatory statute. The Second Circuit also held that even though 12 U.S.C. §1821 (e)(5)(A)(ii) provided that the lessee under a repudiated lease could "remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation" and New York State law permits these tenancies to continue upon each reauthorization of state statute, the RTC had the authority to shorten the duration of the tenancy.

On October 3, 1994, this Court granted a writ of certiorari, the judgment of the Second Circuit was vacated and the case was remanded for further consideration in light of this Court's decision in *O'Melveny & Meyers v. Federal Deposit Insurance Corporation*, 114 S.Ct. at 2048. Upon remand, the Second Circuit on January 20, 1995, reinstated its previous opinion with one minor modification relating to the remaining term of the disaffirmed lease. The Second Circuit distinguished *O'Melveny* on several grounds, found that since the relationship between the occupants of the apartments and the landlord commenced with a lease New York's statutes were only modifications to the underlying leases providing the RTC with the ability to repudiate the leases, and that "the non-eviction aspects of the state's laws directly interfered with the execution of Congress' mandate in FIRREA and could therefore be preempted."

However, the Second Circuit's decision on remand misconstrues this Court's decision in *O'Melveny* that state law should define the rights of the lending institution prior to the

RTC's takeover of that institution. Notwithstanding the Second Circuit's position that they are not creating a federal definition of contract or lease in contravention of the strictures laid down by this Court in *O'Melveny*, the Second Circuit clearly ignored New York law and uses FIRREA to redefine the rights of statutory tenants in apartments owned by the RTC.

This is most obvious in the Second Circuit's reduction of the lease term from continuing as long as New York's laws permit to June 1, 1995. Even if one could assume that New York's statutory tenants are really subject to leases, there is no basis in either Federal or state law to limit the lease term. The Second Circuit claims that because the anti-eviction provisions of New York's rent regulations interfere with the operation of §1821(e) they are preempted by FIRREA. However, the Second Circuit ignores the fact that New York's laws do not provide a perpetual tenancy, but only one that continues during the tenant's life and as long as the tenant continues to pay rent. At the very least, on the tenant's death, the RTC will be able to sell or lease the apartment at its full market value. New York's laws are not preventing the RTC from maximizing the value of their assets, but only deferring that maximization. There is no conflict between New York and Federal law permitting the RTC to preempt New York law.

This Court's decision in *O'Melveny* is particularly instructive because it provides the following guidelines:

> It is hard to avoid the conclusion that §1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal

> common law" exceptions is not to "supplement" this scheme, but to alter it.
>
> . . . .
>
> What is fatal to respondent's position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. 114 S. Ct. __

Since the Second Circuit's decision to ignore New York state law in construing §1821(e) cannot be reconciled with this Court's decision in *O'Melveny*, certiorari should be granted and the Second Circuit's decision reversed.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISIONS ARE INCONSISTENT WITH THE PRESUMPTION AGAINST PREEMPTING A STATE FROM EXERCISING ITS POLICE POWERS.

This Court has repeatedly held that, in interpreting federal legislation; there is a strong presumption against the preemption of state and common law. *United States v. Texas*, 113 S. Ct. 1631, 1634 (1993); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This is especially true where the historic police powers of the states are implicated. *See, e.g., Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992). Local regulation of the landlord-tenant relationship, including the adoption of rent control ordinances, is within the traditional police powers of the states. *See e.g., Yee v. City of Escondido*, 112 S. Ct. 1522, 1529 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 12 & n.6 (1988); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); *Bowles v. Willingham*, 321 U.S. 503, 517-18 (1944); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 245 (1922); *Block v.*

Hirsh, 256 U.S. 135, 155-57 (1921). In addition, the Court has held that longstanding concepts of state law should be utilized whenever possible to define terms and fill interstices in federal legislation. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 101-08 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 739-40 (1979); *Butner v. United States*, 440 U.S. 48, 54 (1979); *RFC v. Beaver County*, 328 U.S. 204, 210 (1946).

Similarly, in *O'Melveny* this Court expressly noted that "matters left unaddressed [by FIRREA] are presumably left subject to the disposition provided by state law." Although FIRREA contains numerous definitions, see 12 U.S.C. §1813, the statutory scheme has "left unaddressed" what constitutes a "contract or lease." Thus, the Court's decision in *O'Melveny* also confirms that state law should supply the definition of the terms "contract or lease."

Therefore, since this case involves the police powers of the state, the State's laws should not be preempted without explicit Congressional authority which simply does not exist.

The Second Circuit's decision is particularly surprising since, unlike other preemption cases, the residents of these apartments neither represented nor had any involvement with the failed savings institution. They did not borrow money from, represent the failed lending institution nor benefit in any way from the original loan to the sponsor of their building's conversion to condominium ownership. The right to continue occupying their homes existed prior to FIRREA, the loan to the sponsor and the failure of the lending institution. It is a right that has been repeatedly reaffirmed by New York legislatures for over half a century and is relied on by hundreds of thousands of New York residents who did not benefit from the failed lending institutions, but are paying for the "bail out" with their tax dollars. The rights of the occupants of these apartments must be protected and is in keeping with the state's fundamental right to protect its residents.

CONCLUSION

The decision of the Court of Appeals in this case completely ignored well-settled principles of statutory construction to the potential detriment not only of petitioners, but of thousands of tenants in New York and across the country. In order to correct these errors, and to resolve the decisional conflicts that the Second Circuit's opinion creates, the writ should issue.

Dated: March 20, 1995

Respectfully submitted,

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